

No. 89-1420

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

HERMAN WEINER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.

and

SHANA ALEXANDER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF APPEALS, STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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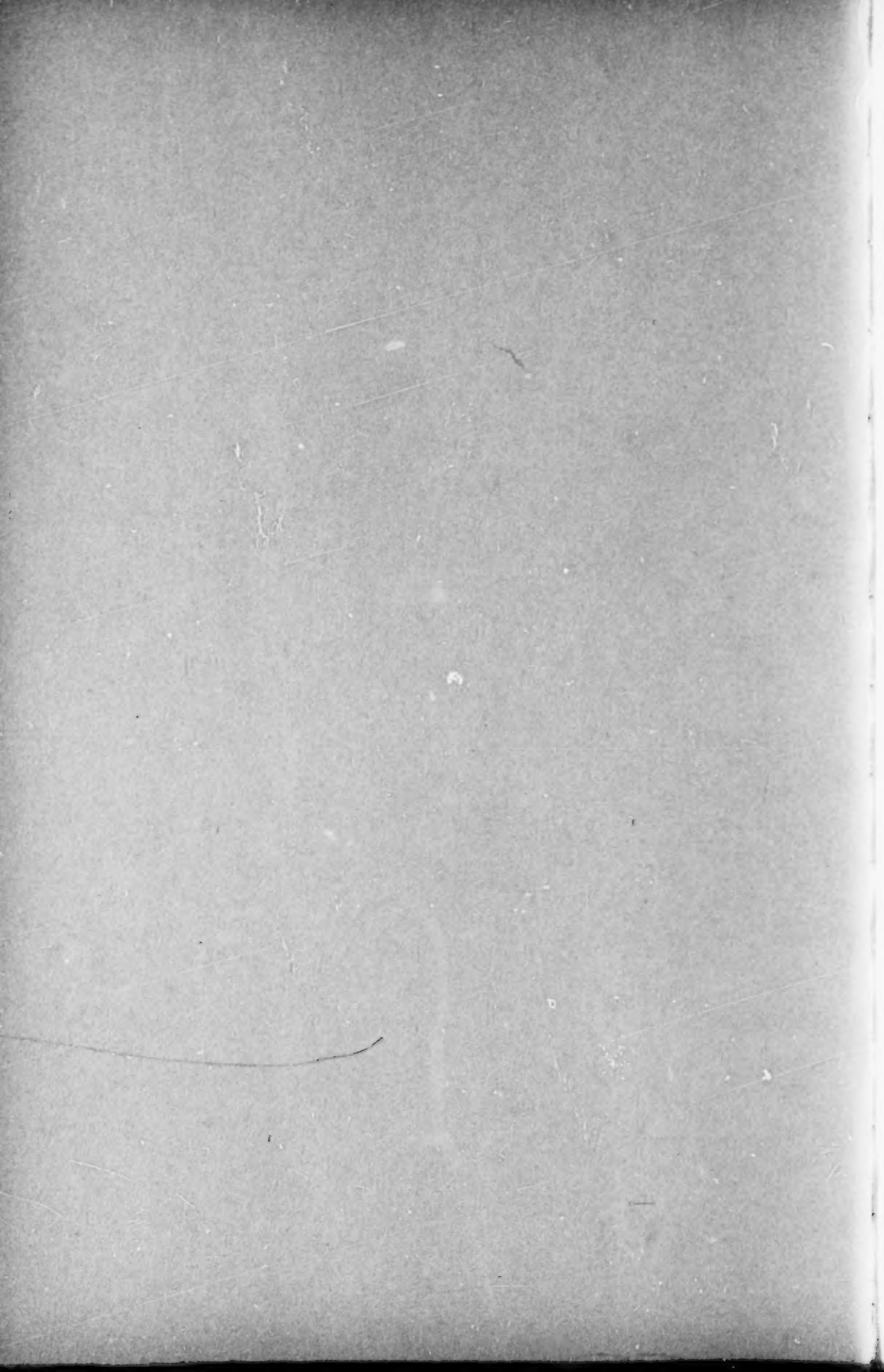


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RULES

Supreme Court Rule 10.1.C



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REASONS FOR GRANTING THE PETITION

I.

THE NEW YORK COURT OF APPEALS' DECISION RESTED ON THE MISINTERPRETATION AND MISAPPLICATION OF FEDERAL LAW GROUNDS ONLY, THAT OF LEGITIMATE PUBLIC CONCERN WHICH ERRONEOUSLY TRIGGERED A STATE FAULT STANDARD MORE ONEROUS THAN ORDINARY NEGLIGENCE, THEREBY CONFLICTING WITH DECISIONS OF THIS COURT ON FEDERAL QUESTIONS OF FIRST AMENDMENT IMPORT.

Legitimate Public Concern is the Federal standard adopted by the New York Court of Appeals in Chapadeau v. Utica Observer-Dispatch Inc., 38 N.Y.2d 196, 379 N.Y.S. 2d 61, 341 N.E.2d 569 (1975) after a cogent historical analysis of this Court's holdings in Rosenbloom v. Metromedia, 403 U.S. 29 91 S.Ct. 1811 (1971), Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), and about ten other Supreme Court cases from New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) onward to Gertz, supra.

The Brief in Opposition repeatedly tends to misstate petitioner's clear stance, as elaborated upon in his main brief, that it is this constitutional standard of Legitimate Public Concern which, petitioner avers, has been unwarrantedly extended beyond the holdings of this Court during the last twenty years, not the fault standard of gross irresponsibility or gross negligence and its application to the facts of the case, a standard of fault permitted to be chosen by the states under the holding of Gertz, supra, wherein the states could choose a standard of fault, less than malice but higher than strict liability, whenever state libel actions interdicted Federal law holdings under First Amendment protection of speech of Legitimate Public Concern.

As was stated in Rosenbloom, supra:

It is clear that there has emerged from our cases decided since the New York Times the concept that the First Amendment's impact upon state libel laws derive not so much from whether the plaintiff is a "public official," "public figure" or "private individual" as it derives from the question whether the allegedly defamatory publications concerns a matter of public or general interest ... in that circumstance we think the time has come forthrightly to announce that the determination whether the First Amendment applies to state libel action is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases (emphasis ours).

Chapadeau, supra, the leading Court of Appeals case cited in its decision in the case at bar adopted the Rosenbloom holding of the constitutional mandate of Legitimate Public Concern together with a fault standard of malice, for a period of about three years when Gertz, a private figure case, as in Rosenbloom, gave permission to the states in private figure cases to choose a fault standard as indicated above.

Private figure cases continue to follow Federal law rulings in all respects as is clearly set forth in Chapadeau.

There is no case decided by the New York Court of appeals in which any independent, adequate state law has been declared or implemented which is in any way dissociated from the First Amendment constitution mandate of Federal law.

At two points in its decision in the case at bar, the Court of Appeals cites its leading case, Chapadeau, supra:

Alternatively, defendants argue that the statement concerns a subject "reasonably related to matters warranting public exposition" (Chapadeau, 38 N.Y.2d at 199, supra, A6.

and again at A14:

In Chapadeau we held that where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the defamed party must establish "that the publisher acted in a grossly irresponsible manner...."

It is clear that the Chapadeau guidelines following and incorporating Rosenbloom and Gertz are the federally mandated standards and have been since 1975.

To state, therefore, that in discussing the implications of Gaeta v. New York News Inc., 62 N.Y.2d 340, 477 N.Y.S.2d 82 (1984), the Court of Appeals cited only state law as authority is clearly inaccurate.

Petitioner, as appellant in the Court of Appeals, did not concede that Nutcracker, a "quasi" true-crime story, was a matter of Legitimate Public Concern, but that even if it were so, arguably, the gratuitous adverting to appellant Herman Weiner was not encompassed within that definition by way of the defamatory three sentences discussed in petitioner's main brief; that the statements about petitioner were not part of any inquiry or investigation of the treatment by the

dozen or so psychotherapists who attempted to help the main protagonist, Frances, and that the murder of his grandfather by Frances' son, ten to fifteen years after he began to treat Frances, when her children were two and three years of age, was not a matter of public issue or concern as understood by this Court.

In Gaeta, supra, however, the court of Appeals did not set a new independent and adequate state standard dissociated from the Court's abiding efforts to balance the evolving equities between the First Amendment and private and public reputations. The Gaeta case, contrary to the statement in respondents' brief A-24, did not create its own precedent, its own standard.

The one reference to Gaeta in the Court of Appeals decision is at A-15, when in commenting on petitioner's contention that the false defamatory statements about

him was a detour from Legitimate Public Concern into the realm of mere gossip and prurient interest, the Court stated:

This is precisely the sort of line-drawing that, as we have made clear, is best left to the judgment of journalists and editors which we will not second-guess absent clear abuse.

There is a full discussion of this case in petitioner's main brief which confirms, additionally, its confusion between Legitimate Public Concern and what the public is interested in and that it has decided not to attempt to delineate what is and what is not Legitimate Public Concern.

This certainly does not appear to be a new precedent, an independent and adequate state ground.

The federal cases cited by respondent's brief on the issue of independent and adequate state ground clearly appear to support petitioner's contention, the

case of Michigan v. Long, 463 U.S. 1032 being particularly apposite.

II.

PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO A JURY TRIAL UNDER THE FOURTEENTH AMENDMENT UPON THE FINDING OF THE COURT OF APPEALS OF NEW YORK THAT ALTHOUGH HE WAS DEFAMED IN HIS PROFESSION, HE WAS NOT ENTITLED TO A TRIAL BECAUSE HE HAD FAILED TO PRESENT A GENUINE TRIABLE ISSUE ON GROSS IRRESPONSIBILITY AND THAT, THEREFORE, SUMMARY JUDGMENT WAS GRANTED AGAINST HIM ON THAT GROUND ONLY.

Petitioner is a private practitioner in the field of psychotherapy. He has been practicing his profession in the City of New York for most of his life and is licensed by the State of New York. He has enjoyed an untarnished professional life up until the 1985 publication of the book Nutcracker, wherein he was accused of sexual intimacy with a patient, Frances, in the early 1960's. The book is a "true crime story" of the murder of a grand-

veracity of the defamers and their acknowledged prejudice and hostility.

3. The Court of Appeals assumed that the defamers were in a position to know the truth, although they specifically stated their "belief," "wonder" and "claim."

The Court of Appeals declined to evaluate independently whether or not the statements about petitioner were matters of Legitimate Public Concern but stated that such a choice of what was in the public interest and concern was a matter for journalists and editors, and that the amount of money devoted to the enterprise (the publication of the book) was some evidence of its "interest to the public," nor would they "second-guess" the press absent "clear abuse."

The book Nutcracker was on the best-seller list throughout the country and in New York City and environs for many

months. While petitioner suffered mental and emotional anguish, and his practice has declined, he cannot as yet assign a specific money loss attributable to the defamation.

Petitioner's contention is that the misinterpretation and misapplication of the Public Interest standard erroneously triggered a higher, more onerous standard of gross irresponsibility for him to prove, nor was there any acknowledgement by the Court of Appeals of indicia of malice, noted by the lower Court, which on a full trial would have enabled him to overcome any media privilege and even allow him to prove constitutional or common law malice, or in any event those elements bypassed in the Court's considerations.

Contrary to the holding in Paul v. Davis, 424 U.S. 693 (1973), petitioner's liberty interest was accompanied by his

impairment of his professional worklife under the Fourteenth Amendment, due to the false defamation per se.

CONCLUSION

The petition for a writ of certiorari presents substantial issues warranting review, properly reviewable by this Court and should be granted.

Dated: New York, New York
April 16, 1990

Respectfully submitted,

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father by his grandson, the son of his patient, in 1978, about ten years after he ceased treatment of Frances, who had been treated since childhood by many therapists before and after petitioner. When he treated Frances, her children were two and three years of age.

Documentary proofs in the record reveal that the following findings were not considered by the Court of Appeals, who did not grant summary judgment against him on what a jury would conclude:

1. That the Supreme Court of New York in granting summary judgment to him on liability found the following:

- a. that there was evidence of distortion by the author who, in transcribing her written notes to the printed version in the book, made the accusations seem more factual and reasonable;

b. that the author claimed to believe in the truth of the accusation although there were no factual grounds for the conclusory factual assertions;

c. that on petitioner's motion for summary judgment there were no affidavits from any one of the three persons who uttered the libelous speculations;

d. that petitioner's affidavit of innocence in the matter was uncontradicted by any affidavit asserting any fact by any libeler;

e. that there was no evidence or fact presented in corroboration of the defamation in respondent's motion for summary judgment; and

f. there was no evidence of any substantiation of investigation for the defamatory statements.

2. The Court of Appeals did not take note of the blatant unreliability for